Murphy & Buchal LLP
Attorneys at Law

2000 S.W. First Avenue, Suite 420
Portland, Oregon 97201

James L. Buchal

telephone: 503-227-1011
fax: 503-227-1034
e-mail: jbuchal@mbllp.com

November 17, 2008

BY FIRST CLASS MAIL

Dr. Darryll Olsen
Columbia Snake River Irrigators Association
3030 W. Clearwater, Suite 205-A
Kennewick, WA 99336

Dear Dr. Olsen:

You have asked me to render an opinion concerning the meaning of the phrase "stock-watering purposes" in RCW 90.44.050, and address contentions presented in a letter from Mr. Kenneth Slattery, dated November 12, 2008, that the phrase is limited to the quantity of water used for "animal intake". I conclude, for reasons set forth in detail below, that the Pollution Control Hearings Board (PCHB) correctly defined this term in *DeVries v. Ecology*, No. 01-073 (2001)[1] to mean:

> ". . . all reasonable uses of water normally associated with the sound husbandry of livestock. This includes, but is not limited to, drinking, feeding, cleaning their stalls, washing them, washing the equipment used to feed or milk them, controlling dust around them and cooling them."

I also conclude that Mr. Slattery's objections to this definition lack merit.

As the PCHB correctly observed, absent a statutory definition, the starting point for interpreting a statutory term is the "plain and ordinary meaning ascertained from a standard dictionary". *State v. Watson*, 146 Wash.2d 947, 954 (2002). As the PCHB also correctly observed, the term is not included in most common dictionaries, but does have a "plain and ordinary meaning" in the agricultural context: the use of water to care for livestock.

The PCHB also noted that the statute refers to "stock-watering purposes" in the plural, which confirms that the water may be used to care for livestock in multiple ways. Mr. Slattery's suggestion that the term "purposes" was plural because of the need to account for "different kinds of [live]stock" is not credible, since the term "stock"

[1] The *DeVries* decision was appealed to Superior Court, but the case settled without overturning or modifying the PCHB's rulings, so that the PCHB's decision concerning the definition of "stock-watering purposes" remains authoritative.

inherently embraces a plurality of kinds of livestock (cattle, pigs, sheep, horses, etc.). The "plain and ordinary" meaning to be applied to the phrase as a whole is to embrace all of the uses associated with caring for the class of animals constituting "stock".

Mr. Slattery has also argued that the case of *Kim v. PCHB*, 115 Wash. App. 157 (2003) should be read as somehow undermining or overturning *DeVries v. Ecology*. Again this is not a view consistent with conventional legal reasoning, for a court's reversal of an agency on one point (the definition of "industrial") does not undermine agency conclusions on another point (the definition of "stock-watering purposes") not addressed by the court. Properly understood, *Kim* supports a broad reading of the exemptions in RCW 90.44.050, even though the *Kim* court only addressed the "industrial" exemption.

Specifically, the *Kim* court expanded the "industrial" definition in RCW 90.44.050 to include operations of a commercial nursery over Ecology's objection that the statute's explicit exemption of "noncommercial gardens" necessarily forbid any exemption of "commercial gardens". As the *Kim* court explained, "[e]ach provision has its purpose, and neither provision is superfluous—even if the 'industrial purposes' exemption is construed to include commercial nurseries". *Kim*, 115 Wash. App. at 163. By the same token, the "stock-watering" exemption has its purpose, even if particular stock-watering operations may be characterized as "industrial".

More generally, the *Kim* court emphasized that "[s]ince 1995, the legislature has not amended RCW 90.44.050, despite a number of proposals that it do so", 115 Wash. App. at 161, and squarely rejected the view that "an administrative agency can alter the plain meaning of a statute to meet changing societal conditions", *id.* at 163; the proper remedy, instructed *Kim*, is "for the legislature to amend it", *id.* While the raising of livestock may no longer enjoy the exalted status it did in 1945 when RCW 90.44.050 was enacted, the statute and its protective policy favoring livestock husbandry must continue to apply by its terms until amended. For this reason, Ecology's attempts to limit the definition of "stock-watering" by regulation, *e.g.*, WAC 173-511-070(4) (purporting exclude "feedlots"), are likely to be set aside as inconsistent with the statute.

Mr. Slattery also points out that one aspect of the PCHB's *DeVries* decision, holding that the stock-watering exemption was limited to 5,000 gallons/day, was subsequently rejected in a formal opinion of the Attorney General that remains binding upon Ecology. (AGO 2005, No. 17.) The definition of "stock-watering purposes" is analytically distinct from, and independent of, the *quantity* of water that may be appropriated for such purposes. For this reason, it is not accurate to characterize the quantity limitation as a "premise" of the PCHB's definitional conclusion: the "plain and ordinary meaning" of the statute is the same whether the herd is watered with one thousand gallons/day or ten thousand gallons/day.

Finally, Mr. Slattery argues that as an exemption to the permit system, RCW 90.44.050 must be narrowly construed, citing *R.D. Merrill v. PCHB*, 137 Wn.2d 118, 140 (1997). That case, however, suggested that statutory exceptions to *relinquishment* should

be narrowly construed "to give effect to legislative intent underlying the general provisions". *Id.* The primary task of statutory interpretation, of course, is to effectuate the intent of the Legislature, which has manifestly accorded special privileges to those engaged in the care of livestock.

Giving full effect to the exemption here has no adverse impact upon any broader purposes served by the permit requirement insofar as once the water right is perfected—notwithstanding the absence of a permit—the rights obtained are no greater than rights established by permit under chapter 90.44 RCW, including the "first in time, first in right" principle that will protect senior water rights holders. Mr. Slattery's invocation of Ecology's right to require reporting concerning withdrawal quantities, as expressly permitted by RCW 90.44.050, further attenuates any suggestion that the exemption is somehow inconsistent with statutory purposes.

Sincerely,

[original signed by]

James L. Buchal